his own expense.[17] The case where the public health requires the complete removal of the dam is probably the closest that could be stated. By the test already suggested, it would apparently fall under the police power, but it has been declared, by way of *dictum*, to be eminent domain, requiring compensation.[18] There is, however, an essential difficulty in saying that any property is taken to be used for the public.[19] Rather a stream is restored to its natural state by removing an obstruction producing unhealthy conditions.

The destruction of property where necessary in the public interest is familiar to the police power,[20] but rare under eminent domain.[21] Assuming that it cannot be done, under authority only to abate nuisances, unless the conditions can be adjudged to constitute a nuisance according to common law,[22] yet apparently the police power is adequate for appropriately authorizing the removal of a detriment to public health not within the common-law definition of a nuisance.[23] Conceding that justice and good faith would oblige the legislature to compensate the owner of such a dam, especially if its original erection was authorized or consideration exacted in return,[24] yet, if the constitution recognizes this obligation as a legal requirement only in cases of taking for public use, it should not be for the court to strain its terms in order to overthrow a statute justified by the police power.[25]

CORPORATION'S RIGHT TO AVOID TRANSACTIONS WITH DIRECTORS. — The determination of a corporation's right to avoid transactions in which any of its directors are adversely interested, and which have not been ratified by the shareholders, raises problems somewhat similar to those presented in the analogous situation of transactions between an ordinary principal and his agent.[1] It is established doctrine that in the latter case

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[17] State *v.* Beardsley, 108 Ia. 396, 79 N. W. 138; Parker *v.* People, 111 Ill. 581. *Contra*, Woolever *v.* Stewart, 36 Oh. St. 146.

[18] See Miller *v.* Craig, 11 N. J. Eq. 175, 186; Talbot *v.* Hudson, 16 Gray (Mass.) 417, 427. In the latter case the object was to drain meadows in promotion of agriculture.

[19] See Livingston *v.* Ellis County, 30 Tex. Civ. App. 19, 21, 68 S. W. 723, 724.

[20] Gardner *v.* Michigan, 199 U. S. 325, 26 Sup. Ct. 106; Newark, etc. Ry. Co. *v.* Hunt, 50 N. J. L. 308, 12 Atl. 697. See Russell *v.* Mayor, etc. of New York, 2 Den. (N. Y.) 461.

[21] Merely the amount or value of the property which it is necessary to take should not turn the case into one of eminent domain.

[22] People *ex rel.* Copcutt *v.* Board of Health, 140 N. Y. 1, 35 N. E. 320; Yates *v.* Milwaukee, 10 Wall. (U. S.) 497.

[23] See Miller *v.* Craig, *supra*, 185; Train *v.* Boston Disinfecting Co., 144 Mass. 523, 530, 11 N. E. 929, 936; TIEDEMAN, LIMITATIONS OF POLICE POWER, § 122. *Cf.* Rideout *v.* Knox, 148 Mass. 368, 19 N. E. 390.

[24] See Stone *v.* Mississippi, 101 U. S. 814.

[25] So a city may cause the removal of a powder magazine despite having formerly sold the land for its location. Davenport & Morris *v.* Richmond City, 81 Va. 636. *Cf.* Dunham *v.* City of New Britain, 55 Conn. 378, 11 Atl. 354.

[1] A peculiar problem is presented by contracts of corporations to vary the duties imposed upon their directors, not by contract, but by the relation of directorship. Such contracts may be obnoxious for some reason of policy not applicable to all contracts

the principal can avoid the transaction if any unfairness was practiced upon him by the agent;[2] but if the agent acted fairly, the transaction is not voidable,[3] even in the extreme case where the agent represented both himself and his principal.[4] Similarly, a corporation can avoid a transaction in which any of its directors were adversely interested, if they acted unfairly.[5] But when the directors acted with entire fairness, it is not so easy to achieve a result identical with that in the analogous case of the ordinary principal. A more stringent rule may be required for corporate transactions in which directors are adversely interested, because the latter have far greater opportunity to practice unfairness upon their principal than have ordinary agents. This increased danger of unfair dealing is due to the greater control which a director has over his principal and the other agents of his principal,[6] and to the fact that it is impossible for a director to give notice of his adverse interest to his principal, an indispensable requirement for fair dealing by an agent with an ordinary principal.[7] Do these two difficulties necessitate a rule allowing a corporation to avoid any contract in which its directors are adversely interested, irrespective of the fairness of the latter? The lack of such a rule will to some extent permit, in spite of the closest scrutiny by the courts, the exercise of fraud upon corporations by their directors.[8] But the existence of such a rule will deprive corporations of some measure of the freedom enjoyed by ordinary principals in doing business and choosing agents; for the possibility of subsequent avoidance by the corporation of transactions in which its directors are adversely interested will discourage both dealings by directors with their corporations and acceptance of directorships by those desirous of dealing with the corporation or of serving other corporations dealing with it. That these considerations, and especially the former, are of importance, is illustrated by those cases in which a corporation, refused aid by everyone but its directors, has been saved from insolvency only by dealings with them.[9]

The difficulty of determining whether a corporation will be damaged more by the unfair dealing of its directors or by the curtailment of the corporation's transactions with its directors and of its choice of directors has resulted in a conflict of authority, largely confined to a conflict between the cases of different periods. Most of the earlier decisions adopted the doctrine of voidability of all transactions, irrespective of their fairness.[10] A recent decision is one of the many later holdings to the contrary,

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between corporations and their directors. This special class of contracts, so far as it is affected by such a rule of policy, is not dealt with in this note.

[2] People on relation of Plugger *v.* Township Board of Overseers, 11 Mich. 222.

[3] Rochester *v.* Levering, 104 Ind. 562, 4 N. E. 203.

[4] Burke *v.* Bours, 98 Cal. 171, 32 Pac. 980.

[5] Hoffman Steam Coal Co. *v.* Cumberland Coal & Iron Co., 16 Md. 456; Electric Light Co. *v.* Bates, 68 Vt. 579, 35 Atl. 480.

[6] An instance of the exercise of such control is Pickett *v.* School District, 25 Wis. 551.

[7] Burke *v.* Bours, 92 Cal. 108, 28 Pac. 57.

[8] See Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505, 522. But see Wyman *v.* Bowman, 127 Fed. 257, 273.

[9] Tatem *v.* Eglanol Mining Co., 42 Mont. 475, 113 Pac. 295.

[10] Wilbur *v.* Lynde & Hough, 49 Cal. 290; Munson *v.* S., G. & C. R. Co., 103 N. Y. 58, 8 N. E. 355. It should be noted that Aberdeen R. Co. *v.* Blaikie, Bros., 1 Macq. 461, an early case usually cited in this connection, is a Scotch case.

which have largely displaced the older view. *Wainwright* v. *P. H. & F. M. Roots Co.*, 97 N. E. 8 (Ind.). Thus, by the growing weight of authority transactions of corporations, in which transactions any,[11] or even a majority,[12] of its directors are adversely interested, whether as contracting parties or as directors of the other contracting party,[13] cannot be avoided by the corporation if no unfairness was practiced upon it by the directors adversely interested.

ASSENT OF BUYER TO PASSING OF TITLE ON DELIVERY TO CARRIER. — Delivery of goods to the carrier under a contract to sell ordinarily passes title to the buyer,[1] but if the shipment is not strictly in accordance with the contract, it is said that the buyer must assent.[2] In the absence of any contract, title could not pass until the time that the buyer accepted the offer, and assented to receive title;[3] and it is often said that the waiver of minor provisions, as the acceptance of a new modified contract, has a similar effect.[4] But it seems probable that such a waiver vests the title in the buyer from the time of the shipment.[5] A waiver is not an acceptance. It is strictly the relinquishment under certain conditions of a legal right or defense.[6] But the courts seem to feel that one party to a contract should not suffer from the non-performance of minor conditions inserted solely for his own benefit, and thus in effect give him the power to treat the contract as if it had never contained such a condition. It follows that his assent relates back to the time of shipment. The doctrine is analogous to ratification,[7] and it would seem that it could not operate to defeat the rights of purchasers from the vendor during the interval.[8] There seems no reason in justice to prevent its ousting a trustee in bankruptcy, or even attaching creditors.[9]

A recent case suggests a third possibility. *Lovell* v. *Newman*, not yet reported (C. C. A., Fifth Circ.). The buyer had been induced by fraudulent bills of lading to pay for cotton before it was shipped, and did not assent to the late shipment until after the bankruptcy of the seller. The court said that the assent of a creditor is presumed in the absence of subsequent dissent. It can only mean that the title passed by operation of law

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[11] Beach *v.* McKinnon, 148 Fed. 734; Vonnoh *v.* Sixty-Seventh St. Atelier Building, 55 N. Y. Misc. 222, 105 N. Y. Supp. 155.

[12] Wyman *v.* Bowman, *supra*; Tatem *v.* Eglanol Mining Co., *supra*.

[13] Leavenworth *v.* Chicago, etc. Ry. Co., 134 U. S. 688, 10 Sup. Ct. 708.

[1] Fragano *v.* Long, 4 B. & C. 219.

[2] See Porter Mfg. Co. *v.* Edwards, 29 Hun (N. Y.) 509; Woodruff *v.* Noyes, 15 Conn. 335.

[3] The Frances, 8 Cranch (U. S.) 359; Felthouse *v.* Bindley, 11 C. B. N. S. 869.

[4] See Hanauer *v.* Bartels, 2 Colo. 514, 521.

[5] Richardson *v.* Dunn, 2 Q. B. 218; Orcutt *v.* Nelson, 1 Gray (Mass.) 536; Peters *v.* Elliott, 78 Ill. 321. See Finn *v.* Clark, 12 All. (Mass.) 522, 525.

[6] See San Bernardino Investment Co. *v.* Merrill, 108 Cal. 490, 494, 41 Pac. 487, 488.

[7] See Reid *v.* Field, 83 Va. 26, 33, 1 S. E. 395, 399. It is not ratification because only by a fiction can the shipper be said to act as agent, and because the concurrence of assent and not the relation of agency is necessary to pass title.

[8] *Cf.* Bird *v.* Brown, 4 Exch. 786.

[9] Peters *v.* Elliott, *supra*.